

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

Original & affidavit of mailing

77-1348

To be argued by
MARY MCGOWAN DAVIS

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1348

UNITED STATES OF AMERICA,

—against—

ANDREW TSANAS,

B
P/S
Appellee,

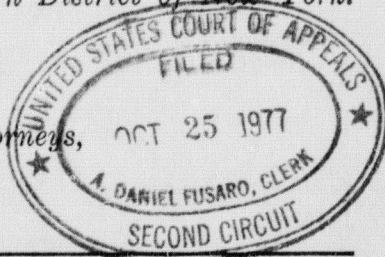
Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

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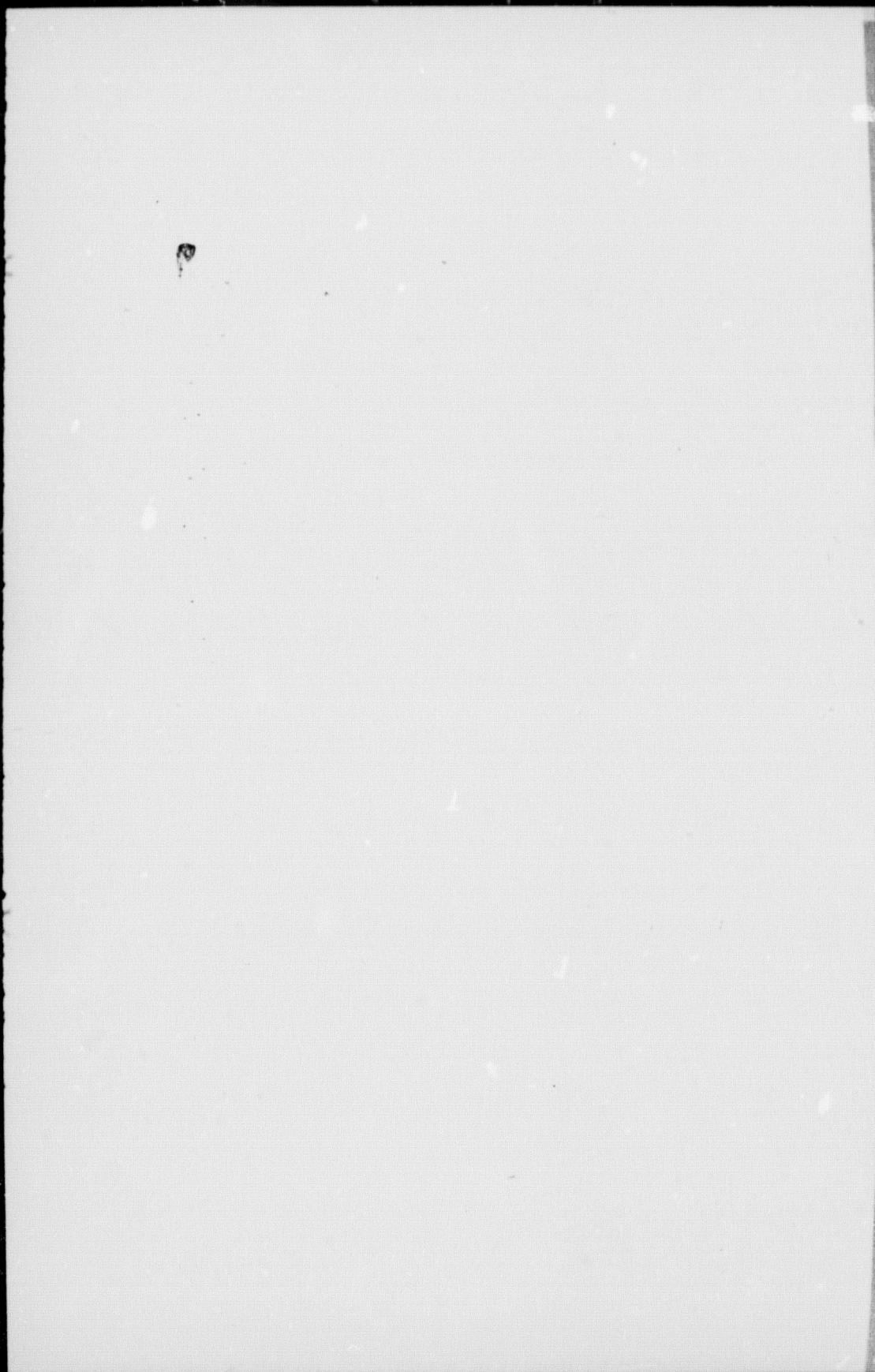


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United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 77-1348

UNITED STATES OF AMERICA,

Appellee,

—against—

ANDREW TSANAS,

Appellant.

BRIEF FOR THE APPELLEE

Preliminary Statement

Andrew Tsanas appeals from a judgment entered on August 5, 1977, in the United States District Court for the Eastern District of New York (Jacob Mishler, *Ch. J.*) convicting him, after a ten day jury trial, of violations of the federal income tax laws.

Indictment 77 Cr. 119, filed on March 3, 1977, charged Tsanas with five counts of income tax evasion for the years 1971-1975, in violation of Title 26, United States Code, Section 7201. Trial began on June 6, 1977 and concluded on June 16, 1977, when the jury convicted Tsanas of income tax evasion for the years 1973, 1974 and 1975 (Counts III, IV, and V) and of wilfully filing a false return for the year 1972 (Count II). Tsanas was acquitted under Count I.

On August 5, 1977, the court sentenced Tsanas, under Counts II and III to concurrent three year terms of imprisonment and a cumulative \$15,000 fine; and under Counts IV and V, to three years probation following his release from prison. Execution of sentence was stayed, and Tsanas is presently free on bail pending appeal.

Statement of Facts

The Government's Case

A. Introduction

In 1971, Andrew Tsanas, an employee of the J.C. Penney Company responsible for awarding construction and maintenance contracts, approached Howard Lazar, president of a large New York construction firm, and offered to guarantee Lazar's company a major role in the impending renovation of the J.C. Penney building, upon payment to him of \$5,000 in cash. Thus began an incredible history of bribery and corruption which culminated in the Government's charge that during the years 1971-1975, Tsanas exacted \$1.4 million in kickbacks from Lazar and other contractors eager to do work for J.C. Penney and then failed to report these sums as income on his tax returns for those years.

At trial, the Government put in evidence of Tsanas's tax evasion under a "specific items" theory. The proof showed that Tsanas had received large sums of cash—\$35,000 in 1971; \$140,000 in 1972; \$240,000 in 1973; \$69,400 in 1974; and \$473,900 in 1975—from Lazar and two subcontractors, Mathew Segall, president of Penguin Air Conditioning Corporation, and Irving Eisenberg, president of Forest Electrical Company, as a price for doing business with J.C. Penney during that company's 23 million dollar renovation of its corporate headquarters.

The Government also demonstrated that Tsanas, whose salary at J.C. Penney averaged \$16,000 a year, adopted a luxurious lifestyle commensurate with his new wealth and that he received an additional \$826,064 in the form of payments by Lazar and Segall to retail stores and contractors for goods and services purchased by the defendant and his friends.

Tsanas wisely does not elect to challenge the sufficiency of the Government's proof, which overwhelmingly established his guilt through the testimony of 60 witnesses and the introduction of countless exhibits.

B. Tsanas and Lazar

Howard Lazar, president of a privately owned general construction company which grossed about \$50,000,000 annually in the early 1970's (Tr. 75),¹ first met Andrew Tsanas in 1971. Tsanas, who was employed by the J.C. Penney Company in the construction and maintenance department (Tr. 83-5), proposed to guarantee Lazar's company the "major work" in the impending renovation of the J.C. Penney building if Lazar would agree to pay him \$5,000 in cash (Tr. 83). Lazar personally made the payments to Tsanas at the St. Mortiz Hotel—in two installments of \$2,500 each—as requested (Tr. 83-4). Several months later, the defendant contacted Lazar about bidding on an important job at the Penny building (Tr. 85-6). Although the bids were "sealed", Tsanas allowed Lazar to view the estimates already received by J.C. Penney for the proposed construction, thereby enabling Lazar to enter a lower and ultimately successful bid (Tr. 86-8). He further encouraged Lazar to make

¹ "Tr." refers to the trial transcript; "GX" to Government Exhibit, and "Br." to Appellant's Brief.

up the cost on the artificially low bid by submitting inflated bills to J.C. Penney (Tr. 88-91).

A few weeks after the Lazar Company had begun work on this project, Tsanas contacted Lazar and demanded \$30,000, promising that "along with making up what we were losing on the job he would make up the \$30,000 for us" (Tr. 92). Thereafter, Lazar paid Tsanas \$5,000 a month in cash at various locations (Tr. 92-4). After four such payments, the \$5,000 was increased, at Tsanas's insistence, to \$10,000 a month for nine months into 1972 (Tr. 96-7); then to \$15,000 for four months starting at the end of 1972 (Tr. 100); and finally, to \$20,000 a month until February, 1974 (Tr. 101-3). During this period, the Lazar Company was the exclusive general contractor for major renovation jobs at the Penney building (Tr. 114), and Lazar estimated that he did approximately \$23 million dollars of work for J.C. Penney from 1971 through 1976 (Tr. 98).

C. Transfer of Debt to Segall

In February, 1974, Lazar learned that the Internal Revenue Service was investigating his company (Tr. 105). He therefore informed Tsanas that he would have to discontinue these large cash payments, to which defendant replied, the "[Lazar Company] would not be doing the work in the building any more if that were the case." (Tr. 107a). Accordingly, it was arranged that Lazar's "debt" to Tsanas (estimated by Lazar at \$500,000) for the enormous business generated by the J.C. Penney contracts would be assumed by a sub-contractor, Matthew Segall, president of the Penguin Air Conditioning Corporation, who was a close associate of

both Lazar and Tsanas (Tr. 833).² Tsanas' anger at Lazar for ceasing the payments was appeased by Segall's offer to assume Lazar's obligation, and Segall already owed Lazar \$500,000 for overpayment by the Lazar Company for work done at J.C. Penney, this was a convenient means of righting that account between themselves (Tr. 833).

Segall himself soon found that it was extremely difficult to raise cash in the amounts demanded by Tsanas³ and suggested alternative ways of payment, such as setting up a consulting service (Tr. 833-5). Tsanas demurred, since that method would require paying a withholding tax (Tr. 834), and instead, proposed that Segall establish charge accounts at Fifth Avenue stores like Mark Cross and Cartier (Tr. 834-5). Segall agreed, and he testified that in 1974 and 1975, Tsanas charged \$3,000 worth of luggage at Mark Cross and \$100,000 worth of jewelry at Cartier, which bills were paid by the Penguin Company (Tr. 841).

Segall also continued to make cash payments to Tsanas at the rate of \$3,000 a month from June, 1974—March, 1976 (Tr. 856-7), and he further acceded to Tsanas's request that Tsanas's mistress, Helga Hensing,

² Indeed, prior to assuming Lazar's "debt", Segall himself had periodically made cash payments to defendant during 1971-1972 in connection with work the Penguin Company was doing for J. C. Penney. Segall testified that these payments amounted to approximately \$2,000 (Tr. 817-9).

³ Segall testified that he made two lump sum cash payments to Tsanas in the spring of 1975, one of \$25,000 and one of \$15,000. He also forwarded \$1,500 in cash to Tsanas in Florida on two occasions and at defendant's behest, made contributions of upwards of \$7,000 to Poly Prep, the school attended by Tsanas's son (Tr. 868-72). Lazar and Eisenberg also made donations to the school (Tr. 143-6, 1106-7).

be put on the Penguin Company payroll at a "salary" of \$800 a week (Tr. 849). Segall never met Miss Hensing, nor did she ever perform work for his company (Tr. 849).

D. Renovation of Tsanas's Apartment and Department Store Accounts

Tsanas's pattern of extravagant spending increased geometrically in 1974 and 1975, as Lazar and Segall continued to pay him compensation for the generous contracts awarded their companies by J.C. Penney (Tr. 127-8). Lazar, who still owed Tsanas for work obtained at Penney after transfer of the prior "debt" to Segall (Tr. 127-8), agreed to furnish the defendant with bank checks made out, in amounts varying from \$2,000 to over \$5,000, to leading retail stores—among them, Bergdorf Goodman, Bonwit Teller, B. Altman & Company, and Brooks Brothers (Tr. 119-121). Lazar estimated that Tsanas received over \$100,000 in bank checks in 1974 (Tr. 121).

Lazar next undertook, at Tsanas's request, to "handle" the construction work and design at a new apartment defendant rented in 1975 at 300 East 56th Street in Manhattan (Tr. 125). Lazar accordingly contacted Charles Flayhan, an interior designer, and instructed him to "take care of everything related to design and furnishing of the apartment and that I would take care of the bills and give him all the money that he needed to design and furnish the apartment." (Tr. 134). Thus began a parade of contractors and sub-contractors to the premises at 300 East 56th Street, and under Flayhan's supervision, Tsanas's apartment was completely renovated according to his own specifications at a total cost of \$150,000 (Tr. 129-31). Among the new structural additions, which ultimately raised the monthly rental value of the luxury apartment from \$1,070 to \$2,500 (Tr. 429),

were marble flooring in the bathrooms and kitchen, expensive new parquet floors in the bedrooms, living room, and dining room, custom-designed cabinets and wall units, and a completely redesigned kitchen area (Tr. 461-72). After the painting and construction work had been completed to Tsanas's satisfaction, he and his wife accompanied Flayhan to New York's finest retail establishments to select furnishings, linen, china, and art for the new apartment. Tsanas's tastes were expensive and the bills—approximately \$8,197 at Baccarat for crystal and silverware, \$18,000 for linens, \$15,000 to Whitcomb and Stewart for furniture, \$154,089 for original paintings from the Kennedy Gallery on 57th Street—all paid by Lazar, ultimately totaled \$412,752.01 (Tr. 134-6, 474-87, 716; GX 1-3, 51-88). Lazar finally told defendant at the end of 1975 that the apartment was "[finished]" and that no more money would be forthcoming for furnishings (Tr. 141).

E. Tsanas's Tax Returns

During the period that Lazar and Segall were lavishing on Tsanas, at his direction, cash, bank checks, and other services, the defendant himself was dispensing generous amounts of money and gifts to his family and friends. Miss Hensing testified that in addition to her weekly check from the Penguin Company, she received frequent cash payments from Tsanas as well as jewelry, expensive furnishings for her apartment, clothes, paintings and other gifts, including round trip first-class tickets to Europe for the witness and her mother (Tr. 949-82, 995-1007). Another woman friend, Julie Walker, was likewise given a \$3,000 check to Bonwit Teller several days after first meeting the defendant (Tr. 636-42), and a third woman, Georgia Spanos, received a new Sony stereo from Tsanas, who told her he was a Greek shipowner (Tr. 945-8).

However, although defendant ran up large bills at Fifth Avenue stores and dispensed hundreds of thousands of dollars worth of gifts to his family and friends, his salary at the J.C. Penney Company, as reported on his income tax returns for the years 1971-1975, remained at a comparatively modest level, rising from \$14,392.83 in 1971 to \$21,744 in 1975 (GX 124-8). This discrepancy between his reported income and extravagant spending habits⁴ formed the basis of the Government's charge that for the five separate years 1971-1975, Tsanas willfully attempted to evade his income tax by filing returns which understated his income, in violation of 26 United States Code, Section 7201. The unreported amounts were \$56,400 in 1971; \$161,515 in 1972; \$240,217 in 1973; \$359,388 in 1974; and \$580,896 in 1975; resulting in tax deficiencies of \$14,804 in 1971; \$78,278 in 1972; \$137,365 in 1973; \$237,621 in 1974; and \$393,612 in 1975 (Tr. 1126-53, 1163-1177; GX 124-31).

F. Defense Case

The defense offered no evidence.

G. The Trial

Because Tsanas raises several points on appeal relating to the adequacy of Judge Mishler's handling of in-trial publicity and his charge to the jury, a review of the record at this point may help clarify the substantive arguments when they are reached for discussion.

First, prior to selection of the jury, the judge inquired of counsel what precautions he should take with

⁴ Tsanas and his wife specifically denied to an Internal Revenue Service investigator that they had any accumulation of cash or currency or that they had incurred large expenditures in jewels, furniture, furs, etc., during these years (Tr. 1157-62).

respect to any pre-trial publicity the case might have received, and Tsanas's attorney indicated satisfaction with the procedure proposed by the Government: that if any juror had read articles about the case, he would be examined separately out of the hearing of the other jurors as to the possibility of prejudice (Tr. 6-10). This is exactly what Judge Mishler did later in the trial, when two jurors admitted having been exposed to a *Daily News* article reporting that Tsanas's wife had pleaded guilty to tax evasion, and both of these jurors were accordingly dismissed (Tr. 615-20, 628-35). The court repeatedly admonished the jury not to read newspapers or otherwise discuss the case (Tr. 38-9).

Likewise, counsel expressed no objection to the court's proposed charge as to what constitutes a non-taxable gift under the Internal Revenue laws (Tr. 1192-1201), nor was he able to tell the court, when asked, how or why discovery of Lazar's corporate tax returns might have a bearing on the defense case (Tr. 10-17).

A R G U M E N T

P O I N T I

The District Court's Charge Correctly Advised The Jury To Proceed To The Lesser-Included Offense Only If It Acquitted Of The Greater Offense; And Sufficiently Instructed The Jurors As To The Nature Of A Gift Under The Internal Revenue Laws.

Although defendant registered no objection to the District Court's charge prior to submission of the case to the jury, he now argues that the court's instructions on two central defense issues were "hopelessly inadequate" (Br. at 12). These arguments are easily dealt with, for examination of the record demonstrates that Judge

Mishler's charge to the jurors was accurate in every respect.

A. The Court Properly Advised the Jury of the Procedure for Considering a Lesser-Included Offense.

A lesser-included offense instruction is appropriate only if there is some rational view of the evidence on which the jury may acquit the defendant of the greater crime and convict him of a lesser, "necessarily included" offense.⁵ *Sansone v. United States*, 380 U.S. 343 (1965); *Berra v. United States*, 351 U.S. 131 (1956). Assuming that Tsanas was entitled to the benefit of a lesser-included offense instruction on the facts of this case,⁶ Judge Mishler

⁵ To be "necessarily included" in the greater offense within the meaning of Fed. R. Crim. P. 31(c), the lesser offense must be such that it is impossible to commit the greater without concomitantly committing the lesser, and the lesser must be included within, but on the facts of the case, not "completely encompassed" by the greater offense. *Sansone v. United States*, *supra*, at 350; *Clais-Castro v. United States*, 416 F.2d 1155 (9th Cir. 1969).

⁶ Although the Government did not protest the District Court's decision to submit 26 United States Code, Section 7206(1) (willfully filing a perjurious return) as a lesser-included offense of 26 United States Code, Section 7201 (willfully attempting to evade income taxes), as counsel requested, defendant mistakenly argues that he had a "clear right" to the lesser charge under *Sansone v. United States*, *supra* (Br. at 11). *Sansone* explicitly held that a lesser-included offense instruction is only proper where the charged greater crime requires the jury to find a "disputed factual element" distinguishing the two. 380 U.S. at 350. The only element differentiating Section 7201 from the lesser crime is the requirement that the Government prove a tax deficiency. Since on the facts of this case, it was never disputed that Tsanas owed substantial additional taxes if the Government's allegations were true, he was not entitled to the lesser charge. "The mere fact that the jury was still free to disbelieve [a portion of testimony with respect to a particular issue] does not elevate [that] issue to

[Footnote continued on following page]

was clearly correct in advising the jurors to consider the lesser charge only if they should first unanimously acquit him of the greater. *Fuller v. United States*, 407 F.2d 1199, 1221, 1232 (D.C. Cir. 1968) (*en banc*), *cert. denied*, 393 U.S. 1120 (1969); *United States v. White*, 225 F. Supp. 514 (D.D.C. 1963); Devitt & Blackmar, Federal Jury Practice and Instructions, § 17.11 at 323-4 (1970). Cf. *United States v. Mathews*, 335 F. Supp. 157 (W.D. Pa. 1971), *app. dismissed*, 462 F.2d 182 (3d Cir.), *cert. denied*, 409 U.S. 896 (1972). As this Court recognized, in *United States v. Harary*, 457 F.2d 471 (2d Cir. 1972), this procedure is dictated by the respective functions of the judge and jury in the federal system and operates to benefit the Government and the defendant alike. Thus, while the jury is not given "*carte blanche* to find defendant guilty of only the lesser offense when such guilt necessarily establishes guilt of the greater offense" [citing *Fuller v. United States*, *supra*, at 1229], it likewise may not, if divided as to the question of guilt on the greater count, "seek the course of least resistance in the jury room and unjustly convict on the lesser instead of forthrightly acquitting." 457 F.2d at 479. See also *United States v. Whitaker*, 447 F.2d 314 (D.C. Cir. 1971).

The cited decisions make plain that the jury's power to determine whether its verdict should reflect a conclusion of guilt as to the lesser or greater offense is limited by its "sworn duty" to decide only issues of fact. *United States v. Harary*, *supra*, at 479. Defendant's objection to the district court's accurate statement of the law governing lesser-included crimes is, therefore, wholly without merit.

a truly "disputed" one; in the language of the Model Penal Code § 1.07(5) (1962), it does not provide a 'rational basis for a verdict acquitting the defendant of the offense charged and convicting him of the included offense.'" *United States v. Markis*, 352 F.2d 860 (2d Cir. 1965) (Friendly, J.), *vac. on other grounds*, 387 U.S. 425 (1967).

B. The Court Properly Refused to Submit 26 United States Code, Section 7207 as a Lesser-Included Offense of 26 United States Code, Section 7201.

Chief Judge Mishler quite properly refused to submit 26 United States Code, Section 7207 as a lesser-included offense of 26 United States Code, Section 7201. Since the method of evasion charged under Section 7201 was the filing of a false return, it is apparent that the facts necessary to prove that defendant "willfully" attempted to evade taxes by filing a false return were identical to those required to prove that he delivered a false return with the intent to evade taxes, in violation of Section 7207. *Berra v. United States, supra*. The lesser crime was therefore "completely encompassed" by the greater and since defendant was either guilty of both or of neither, Section 7207 may not be deemed an included offense of Section 7201 in this case. *Sansone v. United States, supra*; *Berra v. United States, supra*; *Sparf v. United States*, 156 U.S. 51 (1895). See also *United States v. Bishop*, 412 U.S. 346 (1973).

Although defendant proposes that the jury should have been free to pick and choose among the various statutory penalties in view of the fact that the Government's evidence "seemed to show that Tsanas had done something wrong" (Br. at 10), the Supreme Court has repeatedly held otherwise, noting that determination of the punishment to be imposed is a duty traditionally left to the judge. *Berra v. United States, supra*; *Sparf v. United States, supra*. Tsanas's request to charge 26 United States Code, Section 7207 was, therefore, rightly denied.

C. The Court's Instructions as to the Nature of a Non-Taxable Gift Were Sufficient.

After a lengthy discussion with Chief Judge Mishler as to what constitutes a non-taxable gift for the purposes of this case, counsel expressed satisfaction with the court's proposed charge. However, defendant now urges on appeal that the district court's instructions were confusing and misleading and assigns three errors.

First, he argues that the court never expressly told the jury that sums determined by it to be gifts were not required to be reported on Tsanas's return. Instead, the trial judge noted that if "money or other things of value were given" to defendant and these were not found to be gifts, "it then is reportable income." (Tr. 1359). The clear implication of this language was that sums incorrectly denominated as gifts were not taxable under the revenue laws, and the jury was thus on notice that Tsanas could not be held accountable for failure to include them on his returns.

Second, although the district court did not in so many words instruct the jurors to examine the "dominant reason" for the donors' conduct in transferring large sums of money to defendant, see *Commissioner v. Duberstein*, 363 U.S. 278, 286 (1965), the charge clearly invited the jurors to consider the motives of Tsanas's benefactors in order to determine what guiding principle inspired their generosity. Chief Judge Mishler correctly advised that if the jury should conclude the money was given in the form of bribes or kickbacks to assure future construction contracts from J.C. Penney, then it could not be considered a gift for the purposes of federal income taxes (Tr. 1359). Indeed, no other motive for the transfers was suggested by the evidence,⁷ so defendant cannot pos-

⁷ Compare *Carson v. United States*, 317 F.2d 370, 377 (U.S. Ct. Cl. 1963), where the task for the fact-finder was to establish whether "what is called a 'gift' amounts to it in reality."

sibly be prejudiced by omission of the term "dominant reason" from the charge.

Finally, Tsanas—who initially requested that the Court read the *Duberstein* opinion in its entirety to the jurors—complains that language from that decision regarding transfers made "without conditions from detached and disinterested generosity"; "out of affection, respect, charity or like impulses" was inappropriate and misleading where, as here, gifts by a corporation are involved. 363 U.S. at 285. The District Court made plain to the jury that corporations as well as individuals can make non-taxable gifts and the quoted language has been approved in many cases where the subject involved a corporate gift. See *Grinstead v. United States*, 447 F.2d 937 (7th Cir. 1971); *Greentree v. United States*, 338 F.2d 946 (4th Cir. 1964); *Meyer v. United States*, 244 F. Supp. 103 (S.D. Cal. 1965); *Froehlinger v. United States*, 217 F. Supp. 13 (D. Md.), *aff'd*, 331 F.2d 849 (4th Cir. 1964); *Rice v. United States*, 197 F. Supp. 223 (E.D. Wis. 1961).

The Supreme Court in *Duberstein* expressly refused to formulate a concrete test for determining what is and is not a gift under the revenue laws, noting instead that

"(d)ecision of the issue presented in these cases must be based ultimately on the application of the fact-finding tribunal's experience with the main-springs of human conduct to the totality of the facts of each case." 363 U.S. at 289.

See also *United States v. Frankel*, 302 F.2d 666 (8th Cir. 1962). Scrutiny of Chief Judge Mishler's instructions to the jury reveals that he covered the applicable legal principles in "clear, accurate, complete and comprehensible" language, cf. *United States v. Clark*, 475 F.2d 240, 248 (2d Cir. 1973), and there was no error,

much less "plain" error in the charge, see Fed. R. Crim. P. 52(b), which requires reversal of this conviction. See *United States v. Ingenito*, 531 F.2d 1174 (2d Cir.), *cert. denied*, 426 U.S. 939 (1976); *United States v. Bermudez*, 526 F.2d 89 (2d Cir. 1975), *cert. denied*, 425 U.S. 970 (1976).

POINT II

The Trial Court Rightly Refused To Order Disclosure Of Lazar's Corporate Tax Returns.

Tsanas argues that he had a right to disclosure of the Lazar company's tax returns and that court-ordered inspection of all the corporate books and records was an inadequate substitute. This contention is without merit.

Under 26 United States Code, Section 7213 and 6103, the confidentiality of individual or corporate income tax returns is rigidly safeguarded by the Internal Revenue Service, and government employees may divulge the contents of federal income tax returns only in accordance with clearly delineated procedures which, if violated, subject the offender to severe criminal sanctions. 26 United States Code, Section 6103(h)4(c) mandates that a tax return may be disclosed in a federal judicial proceeding only

if such return or return information directly relates to a transactional relationship between a person who is a party to the proceedings and the taxpayer which *directly affects* the resolution of an issue in the proceeding. [Emphasis added].

Although Judge Mishler questioned counsel extensively about his purpose in demanding to see the H.R. Lazar, Inc. income tax returns, counsel was unable to suggest any reason whatever why information garnered from the

returns would be "relevant" or "material" to the defense, see Fed. R. Crim. P. 16(b), much less "directly affect" resolution of an issue in the case. Nor does Tsanas make a showing on appeal why disclosure of Lazar's corporate books and records was insufficient for purposes of cross-examining the witness.⁸

In sum, the District Court was clearly correct to deny disclosure of the corporate tax returns in the absence of any showing by Tsanas that they would be relevant to his defense.

POINT III

The Court's Individual Inquiry And Subsequent Dismissal Of Two Jurors Who Had Been Exposed To A Newspaper Report About the Case Was Sufficient To Protect Tsanas's Right To A Fair Trial.

Tsanas contends that the district court failed to take special precautions to protect the jury's integrity after a newspaper article appeared on the second day of trial reporting that defendant's wife had pleaded guilty to tax evasion. In fact, examination of the record reveals that the trial judge was extremely sensitive to the possibility of prejudice from news coverage of the trial, and his careful handling of the issue when it arose accorded with the procedures prescribed in the case law for protecting a defendant's right to a fair trial.

⁸ The lame assertion that defendant had the right to examine the return "in connection with the jury's undoubted impression" that Lazar deducted payments to Tsanas as business expenses is no more compelling now than when first put forth (Br. at 17), and it should be noted that the witness was subjected to an exhaustive cross-examination by counsel. The court correctly observed that Lazar's corporate returns would have absolutely no bearing on the issue whether Tsanas did or did not get the money Lazar allegedly paid him (Tr. 12-14).

The cases make plain that a judge may exercise wide discretion in investigating and ruling on an issue of prejudice stemming from allegations that jurors have read newspaper articles about a criminal trial, and the Supreme Court has cautioned that each case must turn on its own special facts. *Marshall v. United States*, 360 U.S. 310 (1959). See also *United States v. Hendrix*, 549 F.2d 1225 (9th Cir. 1977); *United States v. Schrimsher*, 493 F.2d 848 (5th Cir. 1974); *United States v. Jannsen*, 339 F.2d 916 (7th Cir. 1964). Although under this standard the district court is given great latitude to fashion an appropriate response to reports of potential juror bias, the protective measure most widely approved by the appellate courts for safeguarding a defendant's right to an impartial jury was the one adopted by Chief Judge Mishler in this case:

[The] court must ascertain if any jurors who have been exposed to such publicity ha[ve] read or heard the same. Such jurors who respond affirmatively must then be examined, individually and outside the presence of the other jurors, to determine the effect of the publicity. *United States v. Margoles*, 407 F.2d 727, 735 (7th Cir.), *cert. denied*, 396 U.S. 833 (1969).

See *United States v. Jones*, 542 F.2d 186 (4th Cir. 1976); *United States v. Pomponio*, 517 F.2d 460 (4th Cir. 1975), *cert. denied*, 423 U.S. 1015 (1975); *United States v. Hankish*, 502 F.2d 71, 77 (4th Cir. 1974); *United States v. Jannsen*, *supra*; *United States v. Largo*, 346 F.2d 253, 256 (7th Cir.), *cert. denied*, 382 U.S. 904 (1965). See also *United States v. Bohle*, 475 F.2d 872 (2d Cir. 1973). Only those articles and reports deemed by the judge to contain "substantial prejudicial material" need trigger

this precautionary procedure,⁹ see *United States v. Jones*, *supra*, at 194; *United States v. Hankish*, *supra*, at 77, and the trial court has discretion to retain a juror who has read such accounts if he is satisfied that "the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court." *Irvin v. Dowd*, 366 U.S. 717, 721 (1961); *Beck v. Washington*, 369 U.S. 541 (1962). See also *United States v. Largo*, *supra*; *United States v. Jannsen*, *supra*.

The district court's prompt response to the problem posed by circulation of the *Daily News* article was thus squarely within the bounds set by the case law, and both jurors who attested to having seen the news item were excused from further service after an individual *in camera* colloquy with the judge. The jury had been admonished from the outset of the trial not to read any newspapers, and there is no reason to think that if others had seen or been told of the story they would have concealed that fact from the court. See *United States ex rel. Goodyear v. Delaware Correctional Center*, 419 F. Supp. 93, 98 (D. Del. 1976).

Finally, it should be noted that when Judge Mishler, prior to selection of the jury, solicited advice from both counsel as to the proper approach to follow in the event that prospective jurors might have seen damaging newspaper publicity, Tsanas's counsel offered no suggestion about how to proceed and instead, indicated his complete confidence in the court's ability to resolve such a dilemma

⁹ It is certainly questionable whether the lone article published during the course of Tsanas's trial rises to the level of "substantial prejudicial material." The newspaper account did not relate to the defendant himself, nor did it reflect on his guilt or innocence of the crime charged. See *United States v. Schrimsher*, *supra*; *United States v. Khoury*, 539 F.2d 441 (5th Cir. 1976), *cert. denied*, — U.S. —, 50 L.Ed. 2d 752 (1977).

fairly. The record makes clear that counsel's confidence was not misplaced, and Tsanas may not now claim prejudice to his defense.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK } ss

Barbara Allen

being duly sworn,
deposes and says that he is employed in the office of the United States Attorney for the Eastern
District of New York.

That on the 25th day of October 1977 he served a copy of the within

Brief For The Appellee

by placing the same in a properly postpaid franked envelope addressed to:

Joseph J. Lombardo, Esq.

Donald Nawi

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Brooklyn, New York 11241

New Rochelle, N.Y. 10004

and deponent further says that he sealed the said envelope and placed the same in the mail chute
drop for mailing in the United States Court House, ^{225 Cadman Plaza East} ~~Washington Street~~, Borough of Brooklyn, County
of Kings, City of New York.

Barbara Allen

Sworn to before me this

25th day of Oct. 1977

Martha Schare

MARTHA SCHARE

Notary Public, State of New York
No. 243480350

Qualified in Kings County

Commission Expires March 30, 1979